Asmara bin Abdul Rahman v Musa bin Aman & Ors

HIGH COURT (SANDAKAN) — SDK-26PP-1/6 OF 2018
AZHAHARI KAMAL J
18 SEPTEMBER 2018

Election — Petition — Petition to set aside election — Allegations of corrupt practices in election — Whether notice of application to strike out petition filed out of time — Whether there was failure to comply with Election Petition Rules 1954 — Whether there was failure to comply with Election Offences Act 1954 — Whether petition ought to be dismissed — Election Offences Act 1954 — Election Petition Rules 1954

The first respondent was the candidate for Barisan Nasional (BN) in the state constituency of N42, Sungai Sibuga during the 14th General Election held on 9 May 2018. The petitioner was a candidate representing Parti Warisan Sabah (Warisan). The first respondent was declared the winner and returned as being the elected member of the State Legislative Assembly of N42 Sungai Sibuga. The petitioner filed a petition on 18 June 2018 claiming the order, inter alia, a declaration that the election for the state constituency of Sungai Sibuga N42 held on 9 May 2018 was void. The petitioner claimed that an offence of bribery under s 10(a) of the Election Offences Act 1954 ('the Act') had been committed so extensively prevailed that they may had affected the result of the election. There were also corrupt practices as prescribed under s 32(c) of the Act committed by the first respondent or with his knowledge or consent or by any of his agent. Hence, the petitioner pleaded case was that there were breaches of s 32(a) and (c) of the Act. On 13 August 2018, the first respondent filed a notice of application to strike out the petition. The petitioner then filed a notice of preliminary objection on 29 August 2018 on the following issues: (a) the notice of application to strike out the petition was filed out of time; (b) the petitioner was not served with the sealed copy of the notice of application; and (c) failure by the solicitor for the respondent to comply with r 9 and r 34 of the Election Petition Rule 1954 ('the Rule'). The issues for consideration were: (i) whether a separate notice under r 9 of the Rule should be filed by the respondent if he chooses to appoint more than one advocates; (ii) whether the petitioner had failed to comply with r 3(1), r 3(2), r 4 and r 15 of the Rules; (iii) whether the petitioner had failed to comply with s 38(1)(a) of the Act; and (iv) whether second and third respondent should be made parties in the petition.

Held, allowing the application and striking out the petition:

(1) The first respondent filed this application on 13 August 2018 and sealed/verified by the registrar on 14 August 2018. Hence, the notice of application was filed within the timeline prescribed by the court. The petitioner was not prejudiced by the late service of the sealed copy of the notice of application. Therefore, there was no non-compliance with the court's direction. Rule 9 only applied to the petitioner as nowhere in r 9 was it stated that the same requirement was extended to the first respondent. It followed that the non-filing of the notice under r 9 by the first respondent was not fatal and thus the preliminary objection was dismissed (see paras 10–11 & 14–15).

(2) Rule 9 did not restrict the number of advocate that could be appointed by the petitioner. While the petitioner may employ more than one advocates, such appointment must be done by filing a separate notice as provided by r 9 for each and every advocate. Consequently, a single notice of appointment of advocate filed by the petitioner herein was not in compliance with r 9 (see paras 23–24).

(3) Rule 3(1) and (2) made it mandatory for the petitioner to 'deliver' the petition at the office of the registrar and required the petitioner to 'leave' two copies thereof. When the petitioner came back to the registry on 28 June 2018 bringing three extra copies of the election petition, the only conclusion that could be made was that between 18 June 2018 and 28 June 2018 there were only two copies of the petition left in the registry, a clear breach of r 3(1) and (2). The subsequent 'delivery' of the additional three copies of the 15 election petition cannot rectify the non-compliance of r 3(2). The requirement under r 3(1) and (2) must be complied with. It was obvious that the said rules were not complied with and the present petition ought to be struck out (see paras 33–34 & 38).

(4) There was no mention in para (c) about the need of publishing the notice in national language in the national language newspaper. It merely required that the notice to be published in a national language newspaper. Considering the fact that English was still the language used in the courts in Sabah and Sarawak, there was no reason why this objection should prevail. Rule 15 now made it mandatory for the petitioner to serve, or attempt to serve, the petition on the first respondent personally under para (a). The petitioner must also then serve the petition using any of the two mode of service under para (b) and (c). There was no personal service of the petition on the first respondent. There must be evidence that, at least, there was an attempt to effect personal service on the first respondent. Due to the non-compliance of the provisions of the Rules, the petition against the first respondent was defective and should be struck out (see paras 42 & 47–49).

(5) Section 38(1) was the general provision. On the other hand, proviso (a) and (b)(i) and (ii) to s 38 applied to the specific ground of avoidance of

the election namely corrupt practice and illegal practice. The proviso to s 38 must be read independently of the s 38(1), hence the word 'since the date aforesaid' which appeared in proviso (a) should not be taken to mean that the filing of the petition on the ground of corruption, and specifically payment of money as in this present case, must be filed within twenty eight days from the date of the publication of the result of the election in the *gazette*. The words 'within twenty eight days after the date of such payment or act' in proviso (a) made it clear that the computation of the twenty eight days starts from the date of payment and not the date of publication. When the present petition was presented on 18 June 2018 the petitioner was already in breach of s 38(1)(a). Hence the petition ought to be dismissed on this ground (see paras 53 & 55).

(6) The reason offered by learned counsel for the petitioner for stating only one polling date ie because the form provided in r 4(4) did not provide for two spaces for both dates to be inserted was unacceptable. The petitioner can always modify the said form by stating the date of the advance polling and the actual polling date. The word '… or one to the like effect …' in the said rule provided the petitioner flexibility in drafting the petition to ensure strict compliance of the rule. As such, the petition could be struck out (see para 61).

(7) The petitioner was making a vague imputation of bribery by the first respondent without giving any sufficient particulars that would enable the first respondent to answer those imputation efficiently. The petitioner had not shown any nexus between the acts of bribery and the first respondent. The petitioner's claim that 'he has personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency also' was not supported by any material particulars. As the matter stood, the charge against the first respondent appeared to be vague and incomplete. The petition ought to be dismissed for non-compliance of r 4(1)(b) and r 4(2) (see paras 69 & 71–72).

(8) There was nowhere in the petition that the petitioner had shown any wrong doing by the second and third respondents throughout the election. There was no reason why the second and third respondents should be made parties in this petition. The petition was defective against the second and third respondents and ought to be dismissed. The defects in the petition had resulted in a jurisdictional failure. Pursuant to s 36(1)(a) of the Act, the first respondent had been duly returned as the member of the State legislative Assembly N42 Sibuga (see paras 76–77).

[Bahasa Malaysia summary

Responden pertama adalah calon Barisan Nasional (BN) di kawasan N42, Sungai Sibuga semasa Pilihan Raya Umum Ke-14 yang diadakan pada 9 Mei 2018. Pempetisyen adalah calon yang mewakili Parti Warisan Sabah ('Warisan'). Responden pertama diisytiharkan sebagai pemenang dan kembali sebagai anggota Dewan Undangan Negeri N42 Sungai Sibuga. Pempetisyen memfailkan petisyen pada 18 Jun 2018 yang memohon perintah, antara lain, deklarasi bahawa pilihan raya untuk kawasan Dewan Undangan Negeri Sungai Sibuga N42 yang diadakan pada 9 Mei 2018 adalah tidak sah. Pempetisyen mendakwa bahawa kesalahan rasuah di bawah s 10(a) Akta Kesalahan Pilihan Raya 1954 ('Akta') telah dilakukan dengan begitu meluas yang mungkin mempengaruhi keputusan pilihan raya. Terdapat juga amalan rasuah seperti yang dinyatakan di bawah s 32(c) Akta yang dilakukan oleh responden pertama atau dengan pengetahuan atau persetujuannya atau oleh mana-mana ejennya. Oleh itu, kes yang diplid pempetisyen adalah bahawa terdapat pelanggaran s 32(a) dan (c) Akta. Pada 13 Ogos 2018, responden pertama memfailkan notis permohonan untuk membatalkan petisyen itu. Pempetisyen kemudian memfailkan notis bantahan awal pada 29 Ogos 2018 mengenai isu-isu berikut: (a) notis permohonan untuk membatalkan petisyen telah difailkan di luar masa; (b) pempetisyen tidak diserahkan dengan salinan notis permohonan yang dimeterai; dan (c) kegagalan oleh peguam responden untuk mematuhi k 9 dan k 34 Kaedah-Kaedah Petisyen Pilihan Raya 1954 ('Kaedah'). Isu-isu untuk pertimbangan adalah: (i) sama ada notis berasingan di bawah k 9 Kaedah hendaklah difailkan oleh responden jika beliau memilih untuk melantik lebih daripada seorang peguam; (ii) sama ada pempetisyen gagal mematuhi k 3(1), k 3(2), k 4 dan k 15 Kaedah; (iii) sama ada pempetisyen gagal mematuhi s 38(1)(a) Akta; dan (iv) sama ada responden kedua dan ketiga dijadikan pihak dalam petisyen.

Diputuskan, membenarkan permohonan dan membatalkan petisyen:

(1) Responden pertama memfailkan permohonan ini pada 13 Ogos 2018 dan dimeterai/disahkan oleh pendaftar pada 14 Ogos 2018. Oleh itu, notis permohonan difailkan dalam tempoh masa yang ditetapkan oleh mahkamah. Pempetisyen tidak dipengaruhi oleh penyampaian lewat salinan notis permohonan yang dimeteraikan. Oleh itu, tiada ketidakpatuhan terhadap arahan mahkamah. Kaedah 9 hanya terpakai kepada pempetisyen kerana tiada di dalam k 9 menyatakan bahawa syarat yang sama dilanjutkan kepada responden pertama. Ia diikuti bahawa ketidakfailan notis di bawah k 9 oleh responden pertama tidak fatal dan dengan itu bantahan awal telah ditolak (lihat perenggan 10–11 & 14–15).

(2) Kaedah 9 tidak menyekat bilangan peguam yang boleh dilantik oleh pempetisyen. Walaupun pempetisyen boleh mengambil lebih dari satu

peguam, pelantikan tersebut perlu dilakukan dengan memfailkan notis berasingan sebagaimana yang dinyatakan oleh k 9 untuk setiap peguam. Oleh itu, satu notis pelantikan peguam yang difailkan oleh pempetisyen di sini tidak mematuhi k 9 (lihat perenggan 23–24).

(3) Kaedah 3(1) dan (2) mewajibkan pempetisyen untuk 'menyerahkan' petisyen di pejabat pendaftar dan memerlukan pempetisyen untuk 'meninggalkan' dua salinan. Apabila pempetisyen kembali ke pejabat pendaftaran pada 28 Jun 2018 membawa tiga salinan tambahan petisyen pilihan raya, satu-satunya kesimpulan yang boleh dibuat ialah antara 18 Jun 2018 dan 28 Jun 2018 hanya terdapat dua salinan petisyen yang ditinggalkan di pejabat pendaftaran, iaitu pelanggaran jelas k 3(1) dan (2). 'Penyerahan' seterusnya tiga salinan tambahan 15 petisyen pilihan raya tidak dapat membetulkan ketidakpatuhan k 3(2). Syarat di bawah k 3(1) dan (2) perlu dipatuhi. Adalah jelas bahawa kaedah-kaedah tersebut tidak dipatuhi dan petisyen yang ada sekarang perlu dibatalkan (lihat perenggan 33–34 & 38).

(4) Tidak disebutkan dalam perenggan (c) mengenai keperluan menerbitkan notis dalam bahasa kebangsaan dalam akhbar bahasa kebangsaan. Ia hanya memerlukan notis yang akan diterbitkan dalam akhbar bahasa kebangsaan. Memandangkan hakikat bahawa bahasa Inggeris adalah bahasa yang masih digunakan di mahkamah di Sabah dan Sarawak, tidak ada alasan mengapa bantahan ini perlu berlaku. Kaedah 15 kini mewajibkan untuk pempetisyen untuk menyerahkan, atau cuba menyerahkan, petisyen pada responden pertama secara peribadi di bawah perenggan (a). Pempetisyen juga perlu menyerahkan petisyen menggunakan mana-mana dua kaedah dari 15 servis di bawah perenggan (b) dan (c). Tiada servis peribadi petisyen kepada responden pertama. Perlu terdapat keterangan bahawa, sekurang-kurangnya, terdapat percubaan untuk memberi servis peribadi kepada responden pertama. Oleh kerana ketidakpatuhan terhadap peruntukan dalam Kaedah, petisyen terhadap responden pertama adalah cacat dan perlu dibatalkan (lihat perenggan 42 & 47–49).

(5) Seksyen 38(1) adalah peruntukan am. Sebaliknya, proviso (a) dan (b)(i) dan (ii) hingga s 38 terpakai kepada alasan tertentu untuk mengelakkan pilihan raya iaitu amalan rasuah dan amalan menyalahi undang-undang. Proviso s 38 mestilah dibaca berasingan dari s 38(1), maka perkataan 'sejak tarikh yang disebut terdahulu' yang muncul dalam proviso (a) tidak boleh diambil untuk bermaksud bahawa pemfailan petisyen atas alasan rasuah , dan khususnya pembayaran wang seperti dalam kes ini, mesti difailkan dalam masa dua puluh lapan hari dari tarikh penerbitan keputusan pilihan raya dalam *warta*. Perkataan 'dalam masa dua puluh lapan hari selepas tarikh pembayaran atau tindakan' dalam proviso (a) menyatakan dengan jelas bahawa pengiraan dua puluh lapan hari

bermula dari tarikh pembayaran dan bukan tarikh penerbitan. Apabila petisyen sekarang dikemukakan pada 18 Jun 2018, pempetisyen telah melanggar s 38(1)(a). Oleh itu, petisyen itu harus ditolak atas alasan ini (lihat perenggan 53 & 55).

(6) Alasan yang ditawarkan oleh peguam yang bijaksana untuk pempetisyen untuk menyatakan hanya satu tarikh pengundian iaitu kerana borang yang disediakan dalam k 4(4) tidak menyediakan dua ruang untuk kedua-dua tarikh dimasukkan tidak dapat diterima. Pempetisyen boleh mengubahsuai borang tersebut dengan menyatakan tarikh pengundian awal dan tarikh pengundian yang sebenarnya. Perkataan '... atau bentuk yang mempunyai maksud seumpamanya ...' dalam kaedah tersebut telah memberikan fleksibiliti pempetisyen dalam merangka petisyen untuk memastikan pematuhan ketat kaedah. Oleh itu, petisyen boleh dibatalkan (lihat perenggan 61).

(7) Pempetisyen telah membuat tuduhan perbuatan rasuah yang tidak jelas oleh responden pertama tanpa memberikan apa-apa butiran yang mencukupi yang akan membolehkan responden pertama untuk menjawab tuduhan tersebut dengan cekap. Pempetisyen tidak menunjukkan sebarang pertalian antara perbuatan rasuah dengan responden pertama. Dakwaan pempetisyen bahawa 'beliau mempunyai pengetahuan peribadi bahawa responden pertama telah mengamalkan sistem pemerolehan undi dengan menggunakan, memberikan atau mengagihkan wang untuk mendorong pengundi untuk mengundi responden pertama sejak pilihan raya umum sebelumnya untuk menjamin pemilihannya di kawasan itu juga' tidak disokong oleh sebarang butiran material. Memandangkan perkara itu berlaku, pertuduhan terhadap responden pertama kelihatan kabur dan tidak lengkap. Petisyen itu harus ditolak kerana tidak mematuhi k 4(1)(b) dan k 4(2) (lihat perenggan 69 & 71–72).

(8) Tiada dalam petisyen bahawa pempetisyen telah menunjukkan apa-apa salah yang dilakukan oleh responden kedua dan ketiga sepanjang pilihan raya. Tiada alasan mengapa responden kedua dan ketiga perlu dijadikan pihak dalam petisyen ini. Petisyen cacat terhadap responden kedua dan ketiga dan harus ditolak. Kecacatan dalam petisyen telah mengakibatkan kegagalan bidang kuasa. Berdasarkan kepada s 36(1)(a) Akta, responden pertama telah dikembalikan dengan sewajarnya sebagai ahli Dewan Undangan Negeri N42 Sibuga (lihat perenggan 76–77).]

Notes

For cases on petition to set aside election, see 6(3) *Mallal's Digest* (5th Ed, 2015) paras 2330–2332.

Cases referred to

Abu Backer Sidek Mohammad Zan v Ramkarpal Singh Dev & Ors [2015] 1 MLRH 541, HC (refd)
Ahmad Jamaluddin bin Abd Majid v Rafidah bt Aziz & Ors [2009] 2 MLJ 646; [2009] 2 CLJ 785, FC (refd)
Ahmad Ramzi bin Mohamad Zubir v Hj Abdul Hadi bin Awang & Ors [2009] 4 MLJ 867; [2009] 7 CLJ 205, HC (refd)
Alexander ak Vincent v Aden ak Denong @ Gabriel Adit ak Demong [2007] 1 MLJ 432, HC (refd)
Che Idris bin Mat Sin v Pegawai Pengurus Pilihanraya Kawasan Parlimen P 026 Peringat & Ors (No 1) [2000] MLJU 738, HC (refd)
Chiew Chiu Sing v Dato' Seri Tiong King Sing [2005] 1 MLJ 759; [2004] 8 CLJ 82, HC (refd)
Chong Thain Vun v Watson & Anor; Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun [1968] 1 MLJ 65 (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)
DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v DIKIM Holdings Sdn Bhd & Anor [2002] 2 MLJ 11, FC (refd)
Dato Dr Awang Adek Hussin v Ahmad Marzuki Shaary & Ors [2013] 1 LNS 1195, HC (refd)
Dayrell Walter Entrie v Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang [2007] 1 MLJ 651; [2007] 7 CLJ 11, HC (refd)
Hii King Chiong v Ting Tiong Choon [2016] MLJU 1078, HC (refd)
Isahak Hamid v Mustapha [1965] 2 MLJ 18 (refd)
Mahdi Hasan v Ahmad Zahid Hamidi [2014] 4 MLRH 106, HC (refd)
Mohamad Hanafi bin Seman lwn Wan Othman bin Wan Yusoff dan lain-lain [2000] 3 MLJ 482, HC (refd)
Mohd Sazali bin Kamilan v Nurul Izzah binti Anwar & Ors [2013] MLJU 1111; [2013] 9 CLJ 782, HC (folld)
Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)
Redzuan bin Stapha v Tuan Mazlan bin Tuan Mat & Ors [2014] 10 MLJ 203; [2013] 1 LNS 1994, HC (refd)
Wan Sagar bin Wan Embong v Harun bin Taib [2008] 6 MLJ 473; [2009] 1 CLJ 457, FC (refd)
Zulkarnaini bin Mohamed Noor v Syed Omar bin Mohamed [1979] 2 MLJ 143 (refd)

Legislation referred to

Election Offences Act 1954 ss 10(a), 32(a), (b), (c), (d), (e), 36(1)(a), 38, 38(1), 38(1)(a), 38(1)(b)(i), (1)(b)(ii), 42(1)
Election Petition Rule 1954 rr 3, 3(1), (2), 4(1)(b), (2), (4), 9, 15, 15(1), (1)(a), (1)(b), (1)(c), 34
Interpretation Act 1948 and 1967 s 17A
Rules of Court 2012

Majnah bt Abdullah (Zaleha Mohd Yusuf Pan with her) (Zakaria Ahmad & Co) for the petitioner.
Mohd Azhier Farhan bin Arisin (FT Ahmad & Co) for the first respondent.
Japar bin Esteban @ Japar bin Nasir (Muammar Julkarnain and Abdul Fikry Jaafar bin Abdullah with him) (Jumahad Julkarnain & Ahmadshah) for the second and third respondents.

Azhahari Kamal J:

[1] The first respondent, Musa bin Aman, was the candidate for Barisan Nasional ('BN') in the State Constituency of N42, Sungai Sibuga during the 14th General Election held on 9 May 2018. The petitioner, Asmara bin Abdul Rahman was a candidate representing Parti Warisan Sabah ('Warisan'), whereas one Osman bin Enting represented Parti Kebangsaan Sabah ('PKS'). The total number of electorate for N42 constituency was 35,454. The first respondent garnered 14,503 votes whereas the Petitioner garnered 12,319 votes. Osman bin Enting only managed to secure 241 votes. The first respondent was declared the winner with a majority of 2,184 votes. There were 525 rejected ballot papers and 164 ballot papers issued but not put in the ballot box. The first respondent was returned as being the elected member of the State Legislative Assembly of N42 Sungai Sibuga.

[2] The first respondent filed the petition herein on 18 June 2018 claiming the following orders:

(a) a declaration that the election for the State Constituency of Sungai Sibuga (N42) held on 9 May, 2018 is void;

(b) a declaration that the first respondent, Musa bin Aman is not duly elected or ought not to have been returned.

(c) costs; and

(d) such further or other relief as the court deems fit.

[3] In this petition, the petitioner claims that an offence of bribery under s 10(a) of the Election Offences Act 1954 has been committed so extensively prevailed that they may be reasonably have affected the result of the election. There were also corrupt practices as prescribed under s 32(c) of the Election Offences Act ('the Act') committed by the first respondent or with his knowledge or consent or by any of his agent. Hence, the petitioner pleaded case is that there were breaches of s 32(a) and (c) of the Act, justifying the relief sought for in this petition.

[4] On 13 August, 2018, the first respondent filed a notice of application to

strike out the petition herein. The petitioner then filed a notice of preliminary objection on 29 August 2018.

[5] The striking out application is premised on the following grounds:

(a) the petitioner failed to comply with r 3(1) and (2) of the Election Petition Rule 1954 ('the Rules');

(b) the petitioner failed to comply with r 9 of the Rules;

(c) the petitioner failed to comply with r 15(1) of the Rules;

(d) the petitioner failed to comply with the requirement of s 38(1)(a) of the Act as the Election Petition was not presented within 28 days from the alleged corrupt practice committed by the first respondent; and

(e) the petitioner is not in compliance with r 4(1)(b), 4(2) and 4(4) of the Rules.

[6] On the other hand, the preliminary objection raised by the petitioner is founded on the following issues:

(a) the notice of application to strike out the petition was filed out of time;

(b) the petitioner was not served with the sealed copy of the notice of application; and

(c) failure by the solicitor for the respondent to comply with rr 9 and 34 of the Rules.

[7] I will deal with the preliminary objection first.

[8] It was submitted by the petitioner that the first respondent has failed to comply with the directions given by this court on 24 July 2018 when filing this application.

[9] The petitioner complaints that he was served with the notice of application on 15 August 2018. However, this was an unsealed and undated copy of the notice. The sealed copy of the notice was only served on him on 16 August 2018 even though the same was emailed to his counsel on 15 August 2018. It was argued that the notice was served out of time and should be dismissed.

[10] It must be noted that the first respondent was directed to file this application on or before 14 August 2018. However that direction was not accompanied by an unless order which spell out the consequences if the direction was not complied with. The direction also did not set the dateline when the said notice of application must be served on the petitioner. Be that as

A it may the record in the case management system shows that the first respondent filed this application on 13 August 2018. The same was sealed/verified by the registrar on 14 August 2018. Hence, I am of the opinion that the notice of application was filed was within the timeline prescribed by this court.

B

[11] Further, even though the sealed copy of the notice of application was served on the petitioner only on 16 August, 2018 the petitioner managed to file the affidavit in opposition and served the same on the first respondent on 23 August 2018, albeit two days outside the time line. In my opinion the notice
C of application. He has knowledge of the same as early as 14 August 2018. The direction given by the court was not made under any of the provision of the Rules which require strict compliance thereof. Hence, based on the facts of this case, I am of the opinion that there is no non-compliance with the court's
D direction. I find no merit on this point.

[12] The second preliminary objection relates to the appointment of advocates acting for the first respondent. It was submitted that the first respondent has failed to comply with rr 9 and 34 of the with regards to the
E appointment of Tengku Fuad bin TA Burhanuddin, Rizwandeen Bukhary bin M Borhan, Mohd Reduan Aklee, Mohd Azhier Farhan bin Arisin and Jeyan TM Marimuthu. There is no notice of appointment of advocates by or signed by the first respondent under r 9 filed in this petition nor the notice of acceptance of the said advocate under r 34 been filed.

F

[13] In essence, learned counsel for the petitioner argued that both rr 9 and 34 of the Rules must be complied with, failing which the advocates on record for the first respondent have no locus to file this notice of application. Since
G there is no notice under r 9 being filed by the first respondent, it was urged upon this court to dismiss the notice of application for non-compliance with the two Rules. In support of this contention, the case of *Dato Dr Awang Adek Hussin v Ahmad Marzuki Shaary & Ors* [2013] 1 LNS 1195 and *Redzuan bin Stapha v Tuan Mazlan bin Tuan Mat & Ors* [2014] 10 MLJ 203; [2013] 1 LNS
H 1994 are cited.

[14] Reading r 9, I am of the view that this provision only applies to the petitioner. It is expressly provided that the petitioner shall leave at the office of the Registrar, a notice signed by him of the advocates authorised by him to act
I on his behalf. Nowhere in r 9 was it stated that the same requirement is extended to the first respondent. Obviously the legislature does not intend to impose the same duty on the respondent under r 9. In my opinion, r 9 does not apply to the first respondent. It follows that the non-filing of the notice under r 9 by the first respondent is not fatal.

[15] Based on the aforesaid reasons, I dismiss the preliminary objection. A

[16] I will now deal with the substantive matter in the notice of application. It is well settled that the petitioner must comply strictly the mandatory requirements of the Rules, failing which the petition may be dismissed without going for trial. In the case of *Chong Thain Vun v Watson & Anor; Hamid Datun v Majanggil & Anor; Richard E Yap v Tun Datu Mustapha bin Datu Harun* [1968] 1 MLJ 65 it was held that: B

> the Election Petition Rules 1954 are mandatory and require strict compliance therewith. Non-compliance with the provisions of the Rule or the Election Offences Ordinance must result in a jurisdictional defect and the court has no power to entertain the petitions C

[17] In the case of *Ahmad Jamaluddin bin Abd Majid v Rafidah bt Aziz & Ors* [2009] 2 MLJ 646; [2009] 2 CLJ 785, the Federal Court through Zulkifli bin Ahmad Makinuddin FCJ (as he then was) opined that: D

> [10] It is to be noted at the outset that the election judge has the jurisdiction to strike out an election petition that is defective without the need to go through the process of a full hearing. This point has been settled by this court following a long line of authorities in the case of *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729 and recently affirmed in the case of *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 wherein the court ruled that a defective election petition includes the following: E
>
> (a) failure to comply with the mandatory requirements of r 4(1)(b) of the EPR which require the petition to state the facts and grounds to sustain the prayers sought; F
>
> (b) failure to relate or associate the complaints advanced with the provisions of election laws alleged to have been transgressed; and
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> (c) failure to set out the facts complying with the twin requirements of s 32(b) of the Act so as to have a cause of action sufficient to sustain the prayers sought. G

[18] Based on the above statement of law, I will now deal with the substantive issues raised in this application. H

WHETHER THE PETITIONER HAD FAILED TO COMPLY WITH R 9 OF THE RULES

[19] The petitioner has appointed two advocates to represent him in this petition namely Puan Majnah bt Abdullah and Puan Zaleha bt Mohd Yusuf Pan. It was pointed out that the petitioner had filed one notice of appointment of advocate under r 9 which consist of the name of the two aforesaid advocates. It was submitted by learned counsel for the first respondent that this is a clear I

breach of r 9 and insist that there should be separate notice been filed in respect of each advocates appointed by the petitioner. For the petitioner, it was submitted that r 9 does not stipulate any requirement that there should be separate notice of appointment for each advocates. It was argued that r 9 has been duly complied with.

[20] Rule 9 provides:

> With the petition the Petitioner or Petitioners shall leave at the office of the Registrar a writing, signed by him or them, giving the name of an advocate whom he or they authorized to act as his or their advocate or stating that he or they act for himself or themselves, as the case may be, and in either case giving an address within Malaysia at which notices may be left. Every such writing shall be stamped with the duty payable thereon under the law for the time being in force.

[21] By virtue of of r 9 the petitioner may either appoint an advocate to represent him or he may choose to act for himself. In both circumstances the petitioner shall leave at the office of the Registrar a notice to that effect, stating the address within Malaysia at which notices may be left.

[22] The issue before this court is whether a separate notice under r 9 should be filed by the respondent if he chooses to appoint more than one advocates. Hence, the authorities cited by the first respondent, in support of his objection, ie *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759; [2004] 8 CLJ 82 and *Dayrell Walter Entrie v Datuk Patinggi Tan Sri Alfred Jabu Anak Numpang* [2007] 1 MLJ 651; [2007] 7 CLJ 11 do not support his submission.

[23] Rule 9, in my opinion, does not restrict the number of advocate that could be appointed by the petitioner. It merely states that the appointment of an advocate must be done at the time of filing of the petition. What then is the position when more than one advocate is appointed by the petitioner? The Rule is made pursuant to s 42(1) of the Act which provides that the procedure and practice on election petition shall be regulated by the Election Petition Rules 1954. There is no provision in the Rule that limit the number of advocate that the petitioner may employ. In this respect, r 9 employ the word 'an advocate' which refer to a singular person. Reading r 9 literally, it is my considered opinion that while the petitioner may employ more than one advocates, such appointment must be done by filing a separate notice as provided by r 9 for each and every advocates.

[24] In the circumstances, a single notice of appointment of advocate filed by the petitioner herein is not in compliance with r 9.

WHETHER THE PETITIONER HAS FAILED TO COMPLY WITH R 3(1) AND 3(2) OF THE RULES

[25] Learned counsel for the first respondent referred to the letter from the petitioner's advocate dated 18 June 2018 (exh MA1) and pointed out that the petitioner had filed seven copies of the petition and by the same letter it was shown that five copies of the petition were returned to the petitioner. Hence it was submitted that the petitioner had only left two copies of the petition, contrary to r 3(1) and (2). It was further submitted that the petitioner had also admitted in para 12.2(a) of his affidavit in opposition that only two copies of the petition were left with the Registry on 18 June 2018 (ie the date of filing of the petition) and that only on 28 June 2018 that he had given three extra copies of the petition at the Registry.

[26] In response, learned counsel for the first respondent admitted that only two copies of the said petition were left at the Registry at the time of filing of the petition. It was also admitted that another five copies of the petition were filed on 28 June 2018. It was argued that assuming that there were only two copies of the petition left by the petitioner at the Registry, there would always be sufficient copies of the petition because the same had been e-filed and uploaded to the CMS (Court Management System). It was also argued that the copies of the petition which were posted on the Sandakan High Court Notice Board and the uploaded copy which contained the verification code assigned by the CMS. Citing the case of *Abu Backer Sidek Mohammad Zan v Ramkarpal Singh Dev & Ors* [2015] 1 MLRH 541, it was submitted that the r 3(1) and 3(2) have been duly complied with. It was further submitted that when the petitioner posted the petition on the Sandakan High Court notice board on 28 June 2018 a copy of the petition had already been posted by the court staff on the notice board.

[27] Rule 3 provides:

> 3(1) The presentation of an election petition shall be made by delivering it at the office of the Registrar and the Registrar of the officer of his department to whom the petition is delivered shall, if required, give a receipt in the following form:
>
> Received on the ..... 20 ..... at the Registry of the High Court, a petition touching the election of A.B.,... for... purporting to be signed by ..... (instate the name of Petitioners).
>
> (2) There shall also be left with the petition two copies thereof.

[28] While under sub-r (1), the petitioner shall deliver the petition at the Registry, sub-r (2) requires two copies of the petition to be filed left at the Registry. Reading sub-r (1) and (2) together, it is mandatory for the petitioner to leave the petition together with two copies thereof. In the case of *Mohamad Hanafi bin Seman lwn Wan Othman bin Wan Yusoff dan lain-lain* [2000] 3 MLJ

A 482 Zulkifli Ahmad Makinuddin J (as he then was) states that:

> Saya berpendapat peruntukan K 3(1) dan K 3(2) dibaca bersama memperuntukkan kesemuanya tiga Salinan petition termasuk Salinan asal perlu ditinggalkan di Pejabat Pendaftar Mahkamah ...

B

[29] Further, in interpreting r 3(2), Sulong Matjeraie J (as he then was) in thecase of *Chiew Chiu Sing v Dato' Seri Tiong King Sing* [2005] 1 MLJ 759; [2004] 8 CLJ 82 held that:

> Rule 3(2) clearly imposes a statutory obligation on the Petitioner to leave two copies
C of the petition at the office of the Registrar of the Court and if this is not fulfilled, that provides the ground for the election petition to be struck out ...

[30] The above two case support my interpretation of r 3(1) and 3(2) namely the petitioner is required by law to file the petition and to leave two copies of
D the petition with the Registrar. Altogether there must be three copies of the petition. However, in this petition it is proven that only two copies of the petition were left in the registry by the petitioner (see exh MA1). This is clearly a breach of r 3(1) and 3(2) and the petition should be struck out on this
E ground.

[31] It must be noted that learned counsel for the petitioner, in their submission, admitted that they had left only two copies of the petition at the High Court Registry on 18 June 2018. However it was further submitted that
F on 28 June 2018, they had given three extra copies of the petition together with the notice of presentation of the petition. Hence, when the first respondent conducted the search at the Sandakan High Court registry on 26 July 2018 there would have been five copies of the petition at that time. It was also submitted that there would always be enough copies of the petition because
G when the petition was presented to the Court Registry, the same was uploaded to the CMS system by the court staff. The uploaded copy of the petition was posted on the notice board of Sandakan Court.

[32] At the risk of repetition, it must be emphasised that the Election
H Petition Rules 1954 is the specific rule governing the practice and procedure of election petitions. Section 42(1) of the Act provides that the practice and procedure on election petition shall be regulated by the Rules. As such the procedure in presenting an Election Petition must be governed by r 3 and only when the Rules is silent on any procedure pertaining to its presentation that the
I court could seek assistance from the Rules of Court 2012.

[33] In this regard r 3(1) makes it mandatory for the petitioner to 'deliver' the petition at the office of the Registrar and r 3(1) requires the petitioner to 'leave' two copies thereof. It is the responsibility of the petitioner to physically

deliver the petition and at the same time he shall leave two copies thereof at the office of the Registrar. This must be done at the time when the petition is being presented. However as shown in exh MA1, five copies of the petition were taken back by the petitioner leaving only second copies at the Registry.

[34] As such, when the petitioner came back to the Registry on 28 June 2018 bringing three extra copies of the election petition, the only conclusion that can be made is that between 18 June 2018 and 28 June 2018 there are only two copies of the petition left in the Registry, a clear breach of r 3(1) and (2). In my judgment, the subsequent 'delivery' of the additional three copies of the election petition cannot rectify the non-compliance of r 3(2). This strict requirement must be complied with at the time the petition was filed.

[35] Learned Counsel for the petitioner also relied on the case of *Abu Backer Sidek Mohammad Zan v Ramkarpal Singh Deo & Ors* and argued that since the court are utilising the e-filing system there would always be enough copies of the petition at the court's registry. In that case the petition was filed electronically and the court opined that the relevant provision of the Rules have to be read in keeping with the electronic regime of filing of court document and depositing of documents filed with the Registry.

[36] However in the present petition, the petitioner chose to file the petition manually. Upon checking the physical file of this petition, it is observed that the petition does not bear the digital signature of the Senior Assistant Registrar of High Court of Sandakan nor does it contain any verification code automatically affixed in any electronic filing of court document. In fact, the acknowledgment signature of Puan Faelly Jeffrey Lanjungan the Senior Assistant Registrar, was affixed manually. It was admitted by learned counsel for the petitioner that the petition was uploaded by the court staff to the CMS. This can only done after the same was filed by the petitioner manually.

[37] In this respect, Ravinthran Paramaguru J in the case of *Hii King Chiong v Ting Tiong Choon* [2016] MLJU 1078 opined that:

> In my view, since there is no provision in O 63A of the Rules of Court 2012 for court staff to electronically file documents on behalf of law firms, the question whether the court staff in question 'e-filed' the petition cannot arise. It is obvious and plain in this case that the solicitors of the Petitioners had manually filed the petition at the court's registry for reasons best known to themselves and the court staff had scanned the hardcopy and had merely 'uploaded' it to the virtual file for ease of reference. This process cannot be equated with e-filing under O 63A which requires 'registered users' to obtain an 'authentication code' from the Registrar to e-file documents ... Since the petitioner or his solicitor had chosen the manual filing method in this case, I am of the view that reliance on the case of *Abu Backer Sidek Mohammad Zan v Ramkarpal Singh Deo & Ors* is unhelpful.

[38] The fact of this present petition with regards to the filing of the petition is similar to the case of *Hii King Chiong v Ting Tiong Choon*. I share the same reasoning by His Lordship in that case. In my considered opinion, once the filing of the petition is done manually, the requirement under r 3(1) and 3(2) must be complied with. In the present petition, it is obvious that the said rules were not complied with and ought to be struck out.

WHETHER THE PETITIONER HAS FAILED TO COMPLY WITH R 15 OF THE ELECTION PETITION RULE

[39] Rule 15 provides for the mode of service of the petition. It states that:

> 15(1) Notice of the presentation of a petition, accompanied by a copy of the petition, shall, within fifteen days of the presentation of the petition, be served by the petitioner —
>
> (a) on the respondent personally, which shall be effected by delivering the notice and a copy of the petition to the respondent;
>
> (b) by sending the notice and a copy of the petition by pre-paid registered post addressed to the respondent at his usual or last known place of residence or business; or
>
> (c) by posting a notice on the notice board of the High Court in the state in which that constituency or electoral ward is situated and by publishing a notice in a national language newspaper and in any newspaper circulating within the constituency or electoral ward in which the election was held stating that such petition has been presented and that a copy of the petition may be obtained by the respondent free of charge on application at the office of the registrar.

[40] The petition was served on the first respondent's on 28 June 2018 by posting the notice of the presentation of the petition and the said petition on the notice board of the High Court at Sandakan and by posting the same in a national language newspaper namely *Utusan Borneo* and in *New Sabah Times*. Both newspapers are in circulation within the constituency.

[41] The first respondent's objection on this heading is two pronged. Firstly it was contended that the notice published in the national language newspaper ie *Utusan Borneo* is in English, not in the national language. It was submitted that the notice published in the national language newspaper under r 15 must be in the national language. According to the first respondent, it defeats all common sense and logic to publish the notice in the national language newspaper while the notice itself is in English. Secondly, it was submitted by learned counsel that the petitioner that the petitioner had failed to serve the petition on the first respondent personally before resorting to the other mode of service under r 15(1)(b) and (c).

[42] With regards to the first objection, I am of the opinion that there is no mention in para (c) about the need of publishing the notice in national language in the national language newspaper. It merely requires that the notice to be published in a national language newspaper. Considering the fact that English is still the language used in the courts in Sabah and Sarawak, I see no reason why this objection should prevail.

[43] Citing the case of *Abu Backer Sidek Mohammad Zan* it was submitted for the petitioner that under Rule 15 the petition may be served by any one of the three modes of service provided in para (a), (b) and (c). In that case Lee Swee Seng J states:

> [50] Rule 15(1) of the EPR allows for any one of the three modes of service of the petition as can be seen in the word 'or' after r 15(1)(b) and before (c). The legislator could have used the word 'and' at the same place but quite deliberately it did not do so. I would hold that a petitioner may serve the petition by any one of the modes prescribed in rr 15(1)(a) or (b) or (c).

[44] However, r 15 had been drafted in such a way that a semi colon was added at the end of para (a) and (b) and the word 'or' at the end of para (b). This can be interpreted that para (a) and (b) are disjunctive; however the presence of the word 'or 'at the end of para (b) may also be interpreted that there must be at least two mode of service of the petition. This has caused an ambiguity in the interpretation of this Rule. Hence, learned counsel for the petitioner and the first respondent are taking two opposite view with regard to the proper interpretation of r 15.

[45] In the circumstances, it is now necessary to consider s 17A of the Interpretation Act 1948 and 1967. It gives statutory recognition to the purposive approach in interpreting a statute (see *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v DIKIM Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11). Section 17A reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[46] It is also settled law that in adopting purposive approach the court is entitled to look for extrinsic aid in interpreting the statute including the Parliamentary Record or *Hansard* (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345). In proposing the amendment to r 15, the Minister was recorded to have said as follows:

A Tuan Yang di Pertua, pada masa ini Kaedah15 memperuntukkan sesuatu notis atau petisyen disampaikan kepada peguam bela yang dilantik oleh pempetisyen. Kaedah ini telah banyak menimbulkan masalah di mana responden itu sendiri tidak menerima notis tersebut.

B Bagi mengatasi masalah ini, saya mencadangkan Kaedah 15 digubal semula untuk membolehkan sesuatu notis atau petisyen itu disampaikan kepada diri responden sendiri dalam tempoh 15 hari selepas petisyen itu dikemukakan dan diikuti dengan dua cara penyampaian yang lain iaitu dengan cara pos berdaftar atau dengan cara menunjukkan suatu notis di papan notis Mahkamah Tinggi di negeri yang petisyen itu dikemukakan. Pindaan Kaedah 15 ini memperuntukkan juga bahawa sesuatu C notis petisyen seseorang pempetisyen itu hendakah disifatkan telah diserahkan walaupun responden enggan menerimanya.

(*Hansard* DR.9.9.2002 at page 67–74.)

D **[47]** The amendment was passed via Election Offences (Amendment) Act 2002 (Act A1177). It must be noted that words 'diikuti dengan' appeared in the record of the speech after the words '... disampaikan kepada diri responden sendiri dalam tempoh 15 hari selepas petition itu dikemukakan ...'. From the speech of the Minister, it is obvious that the legislature had intended that there E must be two mode of service of the petition ie the petition must first be served on the respondent personally under para (a); followed by any of the other two mode of service under para (b) or (c). In my opinion r 15 now makes it mandatory for the petitioner to serve, or attempt to serve, the petition on the first respondent personally under para (a). The petitioner must also then serve F the petition using any of the two mode of service under para (b) and (c).

[48] In our present case, it is obvious that there is no personal service of the petition on the first respondent. I am minded of the events that took place in Sabah after the general election on 9 May 2018 that may have hindered any G attempts to comply with r 15(1)(a). However, there must be evidence that, at least, there was an attempt to effect personal service on the first respondent. Otherwise it is not unreasonable to infer that there has been deliberate non-compliance of the rule.

H **[49]** I am satisfied that, due to the non-compliance of the of the provisions of the Election Petition Rules, as discussed above, the petition against the first respondent is defective and should be struck out.

WHETHER THE PETITIONER HAS FAILED TO COMPLY WITH I S 38(1)(a) OF THE ELECTION OFFENCES ACT 1954

[50] In the petition, the petitioner had pleaded that the act of bribery, in particular payment of money, were committed on 2 May 2018, 8 May 2018 and 9 May 2018. It was submitted by learned counsel for the first respondent

that under s 38(1)(a) of the Election Offences Act, the petition must be presented at any time within 28 days after the date of such payment. The case of *Mohd Sazali bin Kamilan v Nurul Izzah binti Anwar & Ors* [2013] MLJU 1111; [2013] 9 CLJ 782 was cited in support of this contention.

[51] On the other hand, learned counsel for the petitioner submitted that the payment of money was made before the publication of the result of the election. Therefore the 21 days' time line under s 38(1) should apply. Since the result of the election was *gazetted* on 28 May 2018 vide PU(B) 333/2018, the petition was presented within the stipulated time. The case of *Mahdi Hasan v Ahmad Zahid Hamidi* [2014] 4 MLRH 106 was cited in support of this contention.

[52] Section 38(1)(a) provides as follows:

> Every election petition shall be presented within twenty-one days of the date of publication of the result of the election in the Gazette:
>
> Provided that:
>
> (a) an election petition questioning the return or the election upon the ground of a corrupt practice and specifically alleging a payment of money or other act to have been made or done since the date aforesaid by the person whose election is questioned or by an agent of the person or with the privity of the person or his election agent in pursuance or in furtherance of such corrupt practice may, so far as respect such corrupt practice, be presented at any time within twenty eight days after the date of such payment or act.

[53] It is trite law that the election of a candidate at any election may be avoided in a very limited circumstances under s 32(a)–(e) of the Election Offences Act 1954. The petitioner in this petition is relying on s 32(a) and (c) and in particular s 10(a) of the Act. It is for this reason that (a) and (b)(i) and (ii) provide different time line for the presentation of the petition. In my opinion, s 38(1) is the general provision whereby any election petition shall be presented within twenty-one days of the date of publication of the result of the election in the *Gazette*. On the other hand, proviso (a) and (b)(i) and (ii) to s 38 apply to the specific ground of avoidance of the election namely corrupt practice and illegal practice. In my opinion, the proviso to s 38 must be read independently of the s 38(1), hence the word 'since the date aforesaid' which appears in proviso (a) should not be taken to mean that the filing of the petition on the ground of corruption, and specifically payment of money as in this present case, must be filed within twenty eight days from the date of the publication of the result of the election in the *gazette*. The words 'within twenty eight days after the date of such payment or act' in proviso (a) makes it clear that the computation of the twenty eight days starts from the date of payment and not the date of publication.

[54] Hence in *Mohd Sazali bin Kamilan* it was held that:

> [60] Nowhere does the section says that it refers to corrupt practice that took place after the publication of the Gazette. If the legislature had intended that this section is only in relation to acts after the publication in the Gazette then it should clearly state so in the provision. This can be seen in Section 38(1)(b)(i) of Election Offences Act which expressly states '... as respects such illegal practices be presented within the time following at any time before the expiration of 14 days immediately after the date of publication in the *Gazette*.

[55] I am inclined to follow the reasoning in *Mohd Sazali bin Kamilan* the absence of the word 'the date of publication in the *Gazette*' in proviso (a) (unlike in proviso (b)) shows the intention of legislative to allow proviso (a) to stand independently of s (1). The petitioner pleaded that the payment of money were made to the votes on three different dates, the last being 9 May 2018. Hence the last date for the filing of the petition fall on 6 June 2018. In the circumstances, I rule that when the present petition was presented on 18 June 2018 the petitioner was already in breach of s 38(1)(a). Hence the petition ought to be dismiss on this ground.

WHETHER THERE IS NON-COMPLIANCE WITH R 4(1)(b), 4(2) AND 4(4) OF THE RULE PETITIONER

[56] It was contended by learned counsel for the first respondent that the petitioner has failed to comply with r 4(1)(b), 4(2) and 4(4) of the Rule. Rule 4(1)(b) provides:

> (1) An election petition shall contain the following statements:
>
> (a) ...
>
> (b) it shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.

Rule 4(2) provides:

> The petition shall be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed for drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the Court or Judge.

Rule 4(4) provides for the form of the petition.

[57] Firstly it was contended by learned counsel for the first respondent that the petitioner have failed to state the correct dates of the holding of the election in the petition, in that the date of the advance polling was not stated therein. In response, learned counsel for the petitioner argued that the form of the petition

as required by r 4(4) does not provide for two spaces for the twos date of the polling to be inserted; hence only one polling date was inserted in the petition ie 9 May 2018.

[58] In this respect, I take judicial notice that the polling process in Malaysia in a contested election would comprise of both the advance polling (postal vote) and the actual polling. The advance polling will be carried out on an earlier date than the actual polling day. In so far the 14th General Election is concerned, the Election Commission had fixed 5 May 2018 as the date for advance polling day whereas 9 May 2018 was fixed for the actual polling day. These dates appeared in the notice to hold a General Election to the Legislative Assembly of the State of Sabah via Federal Government *Gazette* PU (B) 187 dated 11 April 2018 is as follows:

> ... the advance polling day shall be 5 May 2018 and the polling day shall be 9 May 2018.

[59] The importance of these dates have also been reflected in the result of contested election and statement of the poll after the official addition of votes *gazetted* in the Federal Government Gazette PU (B) 333 dated 28 May 2018 where it was stated that:

> ... as a result of the advance polling day on 5 May 2018 and polling day on 9 May 2018

[60] In my opinion, the different dates of the polling day is a material fact which form part of the many process in the election before an official result will be declared by the returning officer (see *Isahak Hamid v Mustapha* [1965] 2 MLJ 18). I also take judicial notice that the votes obtained by the respective candidates at the advance polling and the actual polling dates will be tallied before the declaration of the winning candidate. As such this date should be mentioned in the petition as this would reflect the whole election process that is being challenged. The need to state the correct date in petition had been emphasised in the case of *Zulkarnaini bin Mohamed Noor v Syed Omar bin Mohamed* [1979] 2 MLJ 143 where at p 146, Mohamed Zahir J opined as follows:

> Thus the date describes the election and if one were to present an election petition in which the date of the election is wrongly quoted then we cannot but come to the conclusion that such election is non-existent, although we very well know that there is a mistake on the part of the petitioner. The petition has become therefore a nullity at the date of filing.

[61] In my opinion, the reason offered by learned counsel for the petitioner for stating only one polling date ie because the form provided in r 4(4) does not provide for two spaces for both dates to be inserted, unacceptable. The

petitioner can always modify the said form by stating the date of the advance polling and the actual polling date. In my opinion, the word '... or one to the like effect ...' in the said rule provides the petitioner flexibility in drafting the petition to ensure strict compliance of the rule. As such, I am of the opinion that the petition may also be struck out under this heading.

[62] The first respondent then contend that the petitioner is in breach r 4(1)(b), 4(2) of the Rules because the petition lacks sufficient material facts to constitute the cause of action.

[63] At the outset, the present petition is founded on the following grounds:

(a) general bribery under s 32(a) of the Act and which have so extensively prevailed that they may be reasonably supposed to have affected the result of the said election; and

(b) corrupt practice under s 32(c) of the Act had been committed by the first respondent or with his knowledge or consent or by any agent of the first respondent. The corrupt practices allegedly committed by the first respondent is the offence of bribery under s 10(a) of the Act.

[64] In view of the above grounds of this petition, it is perhaps necessary to state the law in respect to the same. In so far as the allegation of 'corrupt practice' is concerned, it is trite that this is a quasi-criminal in nature which requires strict requirement in the pleadings. The petitioner would be required to state with precision such acts or instances which can be attributed to the first respondent to indicate his culpability and which he could have to verify at the hearing of the petition. The allegation of corrupt practice (in this petition, bribery) must be proved beyond reasonable doubt by evidence which is clear, unequivocal and unambiguous (see *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 and *Alexander ak Vincent v Aden ak Denong @ Gabriel Adit ak Demong* [2007] 1 MLJ 432).

[65] The need to strictly comply with the requirement of pleading in an election petition is best explained in the case of *Alexander ak Vincent*:

> Presumably to highlight the need to sufficiently substantiate an election petition, learned counsel quoted the following from *Rahim Khan v Khurshid Ahmed & Ors* [1974] MLB (Ind) 138:
>
> > ... An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme

> reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the relumed candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails an election which has been concluded ...

[66] In his petition at para 5.1.1–5.1.5, the petitioner alleged that certain people named in Column E of Table 1 had given moneys, ranging from RM50 to RM300, to the persons named in Column C of the table as 'an inducement or bribery to vote for BN during the Election'. The money was paid on 2 May 2018, 8 May 2018 and 9 May 2018. The persons named in Column C are said to be the registered voter for the said constituency 'whose respective designated voting centres are SK Sungai Manila or SK Sibuga Besar or SK Nunuyan (as the case may be). It was alleged that the persons who gave the moneys 'are/were jointly appointed by the first respondent and one Zakaria bin Mohd Edris @ Tubau through one Datuk Haji Salzo bin Haji Asa'. The moneys were said to have been distributed at various places specified in Column B and there were crowds of other voters waiting for their turn to receive their turn to receive the moneys.

[67] It was further pleaded in para 5.1.6 that between 7 May 2018 and 8 May 2018, at the house of one Rafidah bt Daim, the persons named in Table 2 were 'given and received the sum of RM300 each from the said Rafidah bt Daim who is the 'Jalinan Rakyat' (JR) of UMNO, which post is also known as 'Ketua 10' UMNO, as an inducement or bribery to vote for UMNO. The persons named in Table 2 are the registered voters within the said constituency. The said Rafidah binti Daim was also appointed by the first respondent through the said Datuk Haji Salzo to distribute the money on the first respondent's behalf 'in order to induce the said voters to vote for BN candidate for the said constituency'.

[68] The petitioner also claimed to have personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency. The first respondent is said to have appointed various people to the post of Pemimpin Kemajuan Rakyat (PKR), Pemaju Mukim, Ketua Pusat Daerah Mengundi, Ketua Cawangan UMNO and Jalinan Rakyat to carry out the various duties and functions within the State Government or UMNO or BN as the case may be. It was further alleged that few days before polling day, these people will be summoned by the first respondent whereupon each of them would be given certain amount of monies to be used to pay the voters who had shown inclination of not supporting the BN.

[69] It must be noted that the petitioner made specific reference to the fact that it was the first respondent through Datuk Hj Salzo bin Hj Asa who had appointed the persons who had distributed the money to the voters at the constituency. It was also stated that the said appointment was made jointly by the first respondent and Zakaria bin Mohd Edris who happen to be the first respondent in Election Petition No 2/2018. However, as submitted by learned counsel for the first respondent, among others, that there was no mention as to when, where and how did the first respondent and Datuk Zakaria 'jointly appoint' the named persons to distribute the money. There was also no mention as to when, where and how did Datuk Hj Salzo appoint the named persons who was supposed to distribute the money. Likewise, there is also no mention as to how, where and when Rafidah was appointed by the first respondent 'through' Datuk Hj Salzo bin Hj Asa. As the matter stands, the petitioner is making a vague imputation of bribery by the first respondent without giving any sufficient particulars that would enable the first respondent answer those imputation efficiently. There are also no sufficient particulars that show that Datuk Salzo and Rafidah are the agent of the first respondent. In my opinion, the petitioner has not shown any nexus between the acts of bribery and the first respondent. In this respect, it was observed by Mohamad Azahar J (as he then was) in *Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363 at p 382; [2010] 8 CLJ 608 at p 625 that:

> Bearing in mind that a close nexus and direct nexus must be proved between the alleged bribery acts of the first respondent and/or his agent, and the persons to whom they were made or addressed to, it will be immediately noticed that all the other charges also suffer similar kind of shortcomings.

[70] The same issue was raised in the case of *Ahmad Ramzi bin Mohamad Zubir v Hj Abdul Hadi bin Awang & Ors* [2009] 4 MLJ 867; [2009] 7 CLJ 205 where it was stated that:

> I can accept that the petitioner has pleaded sufficient particulars and grounds that the corrupt or illegal practices had been committed but he has failed to prove sufficient particulars to indicate that the act was committed by the candidate or with his knowledge or consent or by any agent of the candidate. The fact that the act was committed by a person called Mohamad Khalil and his supporters all wearing PAS jacket is insufficient to indicate that the act was committed with his knowledge, consent or by his agent. All that it may indicate at most was that the act may have been committed by the first respondent's supporters whose acts he may not have knowledge or control of. The petitioner had also failed to provide sufficient facts and grounds that this person was an agent of the first respondent apart from merely making a statement that the corrupt practice or illegal practice was committed by 'an agent of the candidate'. The Federal Court in Wan Sagar had ruled that the principle of agency in Election Law although wider 'should not be so extended as to cast the net of agency too wide to include even ordinary party's supporters.

[71] Likewise, the petitioner's claim that 'he has personal knowledge that the first respondent had practiced an established system of canvassing for votes by using, giving or distributing money to induce voters to vote for the first respondent since previous general elections to secure his election to the constituency also' is not supported by any material particulars. The petitioner had failed to at least name the Pemimpin Kemajuan Rakyat, Ketua Pusat Mengundi or the Ketua Cawangan UMNO who had distributed the money to the voters as alleged. It must be noted that the petitioner was at one time worked as a body guard to the late Datuk Haji Basrah bin Abdul Rahman who was the Pemimpin Kemajuan Rakyat of the constituency during the previous elections. It would appear from para 5.1.11 of the petition that the petitioner have met other Pemimpin Kemajuan Rakyat or the Ketua Cawanan UMNO during the previous election. It is safe to infer that, as a bodyguard, he must have accompanied the late Datuk Hj Basrah meeting other persons that had been appointed by the first respondent when the late Datuk Hj Basrah was carrying out his duties. Hence, I do not think that it would be difficult for him to identify, at least, other Pemimpin Kemajuan Rakyat or the Ketua Cawangan UMNO in this petition. As the matter stands, the charge against the first respondent under this heading appears to be vague and incomplete. In the case of *Mohd Zaid bin Ibrahim* the court observed as follows:

> Now, the election petition constitutes the charge levelled by the petitioner at the first respondent and/or his agent. If the charges are framed in such a manner that the specific and necessary ingredient of the offence is not clearly brought out in the charges, it becomes vague and defective. This is not to say that the petitioner is required to file a perfect election petition. The charge must be a document setting out the specific accusation made against a person who is entitled to know its nature at the very early stage ... In *Keshav Prasad v AD Mani* [1961] DEC 133 (MPHC), the High Court of Madhya Pradesh cited the case of *Bhikaji Keshao Joshi & Anor v Brijlal Nandhal Biyani & Ors* AIR 1955 SC 610, where the Supreme Court of India observed that the requirement of full particulars is one that has got to be complied with sufficient fullness and clarification so as to enable the opposite party fairly to meet them and they must be such as not to turn the inquiry before the tribunal into a rambling and roving inquisition. It all comes back to this. Since the pleadings in relation to s 32(c) of the Act concerns 'corrupt practice' the requirement of pleadings are strict (see *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 and *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihanraya N 26 Bangi-Mohd Zakri bin Hj Hissin & Ors and other petitions (No 2)* [2005] 2 MLJ 149; [2005] 5 CLJ 349).

[72] In my opinion, the above observation is fully applicable to our present case. The lack of material particulars on the charge of corrupt practice would leave the first respondent guessing the evidence against him, which to a certain extend would affect his defence. I am of the opinion that the petition ought to be dismissed for non-compliance of r 4(1)(b), and r 4(2).

[73] I will now deal with the objection raised by the second and third respondent. The objection was raised by the learned counsel by way of a letter dated 29 August 2018 on the ground that there are insufficient materials in the petition against the second and third respondent, hence it was submitted that the petition against the second and third respondent are too vague and do not contain material facts required.

[74] Learned counsel for the petitioner objected to the mode of raising this objection by letter. It was submitted that the objection should have been raised by way of an application whereby the petitioner would have the opportunity of filing an affidavit in opposition. The Rule does not prescribed any mode of raising preliminary objection. However, sufficient notice must be served on the opponent so that they would have the opportunity to answer any issues raised in the notice. Hence, in the case of *Che Idris bin Mat Sin v Pegawai Pengurus Pilihanraya Kawasan Parlimen P 026 Peringat & Ors (No 1)* [2000] MLJU 738, the court proceeded to hear the objection raised by the senior federal counsel by way of a letter.

[75] In this case the petitioner was put on notice of the preliminary objection by way of the letter dated 29 August 2018. In that letter, the second and third respondent had particularised the issues that will be raised at the hearing of this application. The issues raised in this letter concerns question of law derived from the petition. Further, these issues are quite similar to the issues raised by the first respondent in this application. In my opinion, there will be no prejudice caused to the petitioner if I were to hear the objection.

[76] The petition filed herein has been subjected to close scrutiny by this court and I must agree with the submission by learned counsel that there is nowhere in the petition that the petitioner had shown any wrong doing by the second and third respondent throughout the election. Based on the petition, I do not see any reason why the second and third respondent should be made parties in this petition. The petition is defective against the second and third respondent and ought to be dismissed.

CONCLUSION

[77] Based on the reasons aforesaid, I am satisfied that the defects in the petition had resulted in a jurisdictional failure. I allow the application and order that the petition be struck out. Pursuant to s 36(1)(a) of the Election Offences Act, I hold that the first respondent had been duly returned as the member of the State Legislative Assembly N42 Sibuga.

[78] After hearing the parties on the issue of costs, I order that the petitioner to pay costs of RM30,000 to the first respondent and RM10,000 to the second and third respondents.

Application allowed and petition struck out.

Reported by Nabilah Syahida Abdullah Salleh